



Northern Ireland
Assembly

Committee for Justice

OFFICIAL REPORT (Hansard)

Legal Aid Approval Process for the
Engagement of Expert Witnesses in Family
Proceedings in the Magistrates' Courts:
Department of Justice

22 October 2020

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Members present for all or part of the proceedings:

Mr Paul Givan (Chairperson)
Ms Linda Dillon (Deputy Chairperson)
Mr Doug Beattie
Ms Sinéad Bradley
Ms Jemma Dolan
Mr Gordon Dunne
Mr Paul Frew
Ms Emma Rogan
Miss Rachel Woods

Witnesses:

Mr John Bradley	Department of Justice
Mr Stephen Martin	Department of Justice

The Chairperson (Mr Givan): Witnesses from the Department are here to outline the results of the consultation on a proposed pilot scheme that will allow psychiatrists and psychologists to be instructed in public law proceedings in the Family Proceedings Court without having to get prior authority from the Legal Services Agency, provided that they work within a fixed hourly rate, a certain number of hours and the Department's proposed way forward. The relevant papers are in members' packs.

I welcome Stephen Martin, deputy director of enabling access to justice division; and John Bradley, head of the civil aid reform branch. You are both very welcome. The meeting will be recorded by Hansard and a transcript will be published in due course. Mr Martin, I will hand over to you.

Mr Stephen Martin (Department of Justice): Thank you, Chair, and thank you for the opportunity to be here today to brief the Committee on the consultation on improving the way that expert witnesses are appointed in public family law cases in the Family Proceedings Court.

Public family law cases involve important decisions about the care and welfare of children who are deemed by social services to be at potential risk of harm. Expert psychologists and psychiatrists are used in around 20% of cases in the Family Proceedings Court, and the purpose of the changes that we are seeking to introduce is about, first, reducing potential delay in those important proceedings by streamlining the approach for appointing experts and, secondly, improving transparency and value for money by standardising the amounts that experts are paid.

The changes that we propose to make are based on the best available evidence, and we plan to test the approach in a year-long pilot. If that is successful, we will look for opportunities to roll out similar

approaches to other types of experts in other types of cases. The pilot will also be used to iron out any operational issues that arise and create a sustainable operational model that can be used more widely within the Legal Services Agency for other expert appointments. The consultation was well received, and additional evidence came to the fore that helped to shape our final proposals. Those are set out in the post-consultation report. There are areas that have changed as a result of the consultation, and those are set out in the briefing note. The two main changes relate to the hourly rate for psychologists and the cap on hours within the general authority. Our plan is to launch the pilot for a year from 1 January and to return the Committee early in 2022 with an evaluation report and an outline of our next steps.

I hope that this short briefing has been helpful. We look forward to your questions.

The Chairperson (Mr Givan): OK. Thank you.

Ms Dillon: That was an excellent briefing. If only they could all be as succinct as that. *[Laughter.]* First of all, we, as a party, did not respond to the consultation, simply because we wanted to see what the responses of the interested bodies — those who understand it best — would be and then take a position from that.

I have a couple of short questions. The first is about the change. Why was there a distinction between psychiatrists and psychologists in the first place? I suppose that I am trying to reassure myself that it was not a case of a lot of psychologists saying, "We should be getting the same as them". I am fairly certain that that was not the case.

Secondly, following the conclusion of the consultation, has the DOJ worked with any practitioners in relation to working out the new time cap and the exceptional circumstances to consider specialisms? What will that mean in practice? I suppose my main question is, what are specialisms? To me, this looks good, as I say. Obviously, this will mean a reduction for some people in their hourly rate, but £100 per hour is a substantial rate. Anybody in that field who is really interested in what they are doing or really cares about the family courts will be more than content to get £100 per hour. I think that, hopefully, this will be a positive move. Having it as a pilot and looking at how it can be rolled out is one of the issues that I always have. It is pilot, pilot, pilot, but never any plans to roll them out. For me, a plan to roll it out is one of the vital elements. I congratulate you on that. I have just those few questions.

Mr Martin: I will start, and John can pick up. As to your first question, we struck the original rates by looking at the NHS salaries for consultant psychiatrists and psychologists. Therefore, we struck £90 and £100. However, the evidence that came back was that we had forgotten about certain things relating to psychologists. We had not taken some things into account. There was also an issue that the rates that they were currently getting were significantly higher. Many of them would never have been working for that kind of rate. That is why we came from £90 to £100. It is broadly in line with what is in place in neighbouring jurisdictions, so we felt that was probably a fairer rate and more likely to get a good body of psychologists that would be prepared to do the work.

John will cover the issue of the time allowed and the other point around exceptional circumstances.

Mr John Bradley (Department of Justice): One of the things that has been beneficial for us in focusing this pilot narrowly on psychologists and psychiatrists is that it has enabled us to work closely with professionals in the field and to go and talk directly to the people who are involved in producing these reports for us. That gives us a much richer understanding of the work that is typically involved in meeting people involved in the cases, conducting psychological assessments, report writing and the other work that goes into the compilation of a report. We have been able to construct a cap on the hours that fully takes into account what we have been told, from people working in the field, reflects their real-life experience of conducting these cases.

With both the hourly rate and the cap on the number of hours, we have pitched them at a level which will cover a reasonable number of the cases to make the standardisation process worthwhile. However, that has some degree of conservatism built in, and the intention is to test how that works in this pilot phase. We are not going to launch it, run it for a year and look back at the end and see what happens. We have built an evaluation system that will give us real-time information on what sorts of applications are coming in for these certificates, how they are being assessed by the Legal Services Agency and what outcomes they result in. Are cases running more quickly on a live basis, or what have you? We have timetabled ourselves to look at it every three months during the 12-month period, but we will also get live reports should any issues emerge during that time.

With regard to the test for going beyond the cap or the hourly rate, we had representation that there are occasions where, perhaps especially in respect of psychiatrists, but to some degree also in respect of psychologists, the issues that the children or family face are so particular or specialised that very few people have the necessary expertise and experience to provide those reports. In those circumstances, it can be necessary to increase the rate that is available to attract those people to do it. We are currently working with the Legal Services Agency so that it will have a robust mechanism for identifying where those criteria are met, to ensure that we do not provide a barrier to the appointment of the necessary expert, but also that we do not create so many exceptions that it undermines the purpose of the general authority in the first place.

Miss Woods: I have a few questions following on from Linda's question about specialism. You mentioned flexibility in the pay, but is there flexibility in the hours as well, if it is a specialist case?

Mr J Bradley: Yes, indeed. The cap on hours that we have set is different for psychologists and psychiatrists and is based on our understanding, based on conversations with the two professions, about the work that is typically involved in the sorts of reports that are seen at this level. There is variability within that. Some of the variability comes from reading time. If there is a great deal of documentary material that the expert has to read before they can produce their report, that can have an effect on the hours. We have therefore set the reading time outside the cap, so the cap on hours is for work done directly on assessing clients and for report writing. The reading time is set separately from that, so it should not give rise to a need for large numbers of prior authorities. However, there will be times when, perhaps, there are a large number of children or children with complex needs. Perhaps other prevailing circumstances dictate that more work is required. Again, there will be flexibility around that. We are working with the Legal Services Agency to identify the correct criteria that will apply in those circumstances.

Miss Woods: In judging whether this pilot has been a success, what do you mean by "success"?

Mr Martin: What we are trying to do for all our projects is set out very clear evaluation criteria at the start. The two main benefits that we are trying to achieve are reducing delay in these proceedings —. They involve the future care of children, so the quicker decisions can be made, the better for the children. That is a key criterion. There is another set of criteria around value for money. The evaluation criteria that we have developed are based on those two things. There is, I suppose, a third around operational issues — how it operates in terms of the Legal Services Agency, the checking regime, information generation and that kind of thing. For each of our projects, we are trying to have a set of evaluation criteria clearly linked to the benefits that we are trying to achieve.

Miss Woods: You said that the hourly rate was broadly in line with other jurisdictions. Do you happen to have the actual rates for the other jurisdictions?

Mr Martin: Off the top of my head, in England and Wales it is £94 per hour for psychologists and £108 for psychiatrists, so we are broadly in the same ballpark.

Miss Woods: Finally, in terms of the responses, obviously the proposals have been changed since there was consultation. Have you gone back to the respondents to detail the proposed changes?

Mr Martin: That is what we are hoping to do. I should have said that at the start. We are hoping, after this session, to publish the post-consultation report, including any comments that the Committee wishes to make. That will let consultees know our plans and next steps.

Ms Rogan: Thanks for the presentation. As you said, saving money and value for money are positive things, but can the Department give us assurances that these new hourly rates and time caps will not have a negative impact on vulnerable witnesses, mainly children, who are in receipt of legal aid, considering that the estimated annual saving of £23,000 is not that high?

Mr Martin: It is £23,000 out of a spend of about £150,000, so it is a fairly large proportion, but I take your point. That is one of the things that we are going to be looking at. As John said, we are not just going to leave the evaluation to the end; we are going to have real-time information. If, for example, we find that we cannot get expert witnesses at those rates, there is an opportunity to intervene earlier. However, we think, based on the best available evidence, that there should be a good proportion of experts prepared to work for that level. In criminal cases, the rate is £100 per hour for psychologists

and psychiatrists, so we are reasonably confident that there will be a good pool. As I said, however, we have the ability to act before the end of the year if we find that there are problems.

Mr J Bradley: Part of the evaluation methodology will involve not just gathering data through applications and so forth through the LSA. We will also look to gather qualitative information from people involved directly in the running of those cases — the judges in the Family Proceedings Court, members of the family Bar, solicitors involved in those cases, the Northern Ireland Guardian Ad Litem Agency and others — on how, if at all, this is affecting the operation of the courts and, therefore, the children involved. We will not be sitting in a Civil Service office, looking at numbers of applications coming in and judging success purely on those terms; we will also look as best we can at the impact on, as you said, the children and families, who are, after all, at the centre of those proceedings.

Ms Rogan: Thank you.

Mr Dunne: Thanks, gentlemen, for your information. Is it fair to assume that a report costs roughly £2,200? If you take eight hours for assessment, eight hours for writing and, say, two children, you are up to roughly £2,200. Is that the average cost?

Mr J Bradley: That is not unreasonable.

Mr Dunne: What about if the expert witnesses have to go to court or other hearings? What sort of rate are they on then?

Mr J Bradley: If the expert witness is called as a witness in the courtroom?

Mr Dunne: Yes.

Mr J Bradley: I think that the typical rates are something like £500 a day and £250 for a half day. That is roughly the sort of fees and payment.

Mr Dunne: You are not sure?

Mr J Bradley: I do not have the precise figure in front of me. I can get back to you with that.

Mr Martin: That is the figure. At the moment, it is a mixed picture, but we are moving to a standard fee of £250 for half a day and £500 for a full day. That is the fee that they would get if they had to appear. In many instances, they do not have to appear, because their report is sufficient. Some of the family judges are very keen that those reports be kept focused and a little less lengthy. They will not necessarily always need to be called, but, if they are, the rates are £250 for half a day and £500 for a full day.

Mr Dunne: Following on from that, the Northern Ireland Audit Office report of 2016 put quite a bit of emphasis on the use of expert witnesses and the need for reform. Is this part of that reform, or have we not really tackled all of those issues? The report of 2016 stated:

"There is no set fee structure for this work. Fees payable under this General Authority have not been revised since 1992 and have an upper limit of £120 hour ... We examined a number of legal aid case files and found that different experts charged different rates for reading and reporting".

Mr Martin: Yes, this project is part of that reform. On the criminal side, standard fees have been in place for some time; it is £100 an hour for these experts in criminal proceedings. On the civil side, a much wider range of experts are used; some of them, such as engineers in road traffic accident cases and so on, for example, are not used very often. That is the first part of our reform on the civil side. There have been changes since that report in terms of how the Legal Services Agency operates expert witnesses and the controls that it puts in place. We hope that this is the project that will initiate change to policy on the civil side, and, if successful, we hope to roll it out to a wider range of experts right across civil law.

Mr Dunne: Is there general support within the legal world to progress that?

Mr Martin: We got quite a positive response to the consultation, in large part because people see it as addressing delay. Emma Rogan's point was really important; as long as whatever we do does not add to the length of time taken in cases, we will have support from the legal profession. I think that the consultation was well received because it was genuinely open and transparent, and we engaged with the right people. As long as we take forward those principles into any further reform, I think that it will be reasonably well supported.

Mr Dunne: It is important that the public out there are assured that legal aid is under control. I know that some effort has been made, and I believe that the total expenditure has been reduced. Are you aware of what the spending was on legal aid last year? Can you verify it?

Mr Martin: The audited accounts for the 2019-2020 year have not yet been produced. The Comptroller and Auditor General is currently completing his audit, so I do not have that figure. I believe that the report will be published by 15 November, and that will have the 2019-2020 figure. The figure for 2018-19 was, I think, £84 million. About £3 million or £3-5 million of that is expert fees right across all of the types of cases, criminal and civil.

Mr Dunne: So you are giving us assurance that there is an increase in confidence in control of legal aid expenditure?

Mr Martin: There definitely is. We are in a much stronger position than we were in 2016, and I think that one of the things that this particular consultation has benefited from is the introduction of the legal aid management system.

Mr Dunne: That is an IT-based system?

Mr Martin: It is an IT system. It is a case management system, and that is giving us much richer information to develop our policy from. It is giving the LSA much better information and a system to manage cases. That has been a major improvement.

The Chairperson (Mr Givan): To finish on this, Stephen, I know that this deals with some of the experts, but obviously there were the PAC recommendations back in 2016 regarding all of the experts. Are you able to update us, in the context of this, on where the Department is at in addressing that report?

Mr Martin: Yes. On that report overall, progress has been made on a number of recommendations. We will be briefing you through a written briefing in November on the statutory registration scheme and the contracting review scoping study. We will give you an update on that. On remuneration reform, I think that we are in a reasonably good place. John is leading this project. We are taking forward standardisation of family fees, and we are currently in the research phase. We have re-scoped that project and narrowed the scope. I am very happy to give you a briefing about that, perhaps post that research phase. We are doing further work on the Crown Court review that was done in 2016. We are doing a further review. That was the review that led to the legal aid strike. We are looking back at that to see whether we can develop further improvements. There is a lot of work to do, Chair, but we are not in a bad place now. We have certainly got that work well planned, and we are focusing our resources as best we can to address those priorities.

The Chairperson (Mr Givan): Members of the public will probably look at these rates of fees and think that they are incredibly high. I understand, though, the context in which you are operating; they are professional people, and you need to be able to strike a rate that actually gets what you need. From a public perspective, when you commission for expert advice, the decision to commission it is a robust assessment before you decide to actually engage an expert, so it is kind of a separate issue. You have to pay the rate that is going to attract the experts, but we need to ensure that there is robust decision-making before you commission what some will regard as very high expert fees.

Mr Martin: Absolutely, Chair. We are not involved in the decision on whether an expert is needed. That is an issue for the judge, but, from talking to some of the senior family judges, I know that they are very keen to only use experts where experts are absolutely needed. In these cases, because we are really engaging human rights through the right to family life and the future of children, there will be cases where experts are absolutely needed. I know that the judiciary are very keen to make sure that experts are only used when they are absolutely required.

The Chairperson (Mr Givan): Thank you for that. Members, if you are content, we thank both of you for coming to the Committee today. It is much appreciated.